

TETON COMMUNICATIONS INCORPORATED

IBLA 94-773

Decided January 8, 1998

Appeal from a decision of the Big Butte, Idaho, Resource Area Office, Bureau of Land Management, rejecting an application for a communications site right-of-way. IDI-30864.

Affirmed.

1. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision reviewing an application for a communications site right-of-way under FLPMA, 43 U.S.C. § 1767(a) (1994), is an exercise of discretion that will be affirmed where the decision appears to be a reasoned analysis of the factors involved and made in due regard for the public interest. Where the record reflects that a communications site providing general coverage to the target area already exists, that granting the application would result in proliferation of communications sites and resulting adverse impacts on visual resources, and that use of the site for general communication purposes would be contrary to the purpose for which the public lands sought are managed, the application is properly rejected where there is no supporting evidence to show that the reasoning behind the rejection is in error.

APPEARANCES: Tony Hafla, Idaho Falls, Idaho, for Teton Communications Inc.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Teton Communications Inc. (Teton), has appealed from a determination of the Big Butte Resource Area Manager, Bureau of Land Management (BLM or the Bureau), issued on July 13, 1994, rejecting an application for a communications site right-of-way on Big Southern Butte, situated in secs. 23 and 26, T. 1 N., R. 29 E., Boise Meridian, Butte County, Idaho.

In support of its application, Teton had advanced two main reasons for requesting development of an electronics site on the Big Southern

Butte. First, it asserted that existing sites failed to provide adequate radio service for parts of the area which Teton wished to reach. Second, Teton argued that

[n]ew services are coming of age daily that use higher and higher frequencies (up to 2 Ghz) for personal communications service (including data, voice, fax, paging, and mobilphone). These services are using very low power transmitters so "line of site" is very important. Big Southern Butte is strategically located to provide these services. Existing sites at Jump Off Peak do not have "line of site" communication paths into much of the area needing these communications services. These "lower power" transmitters have a benefit in that less power is needed to run them.

The site which Teton proposed consisted of a small building which would be painted to blend in with the surroundings and 55-foot poles located at each end of the building. Power would be provided by solar panels designed so as to minimize their silhouette.

The Area Manager rejected Teton's right-of-way application based on that part of 43 C.F.R. § 2802.4(a) which states, "An application may be denied if the authorized officer determines that: (1) The proposed right-of-way or permit would be inconsistent with the purpose for which the public lands are managed." In support thereof, the Area Manager proffered the following reasons:

Our current Land Use Planning Decision (L3.1A) contained in the Big Desert Management Framework Plan (MFP) states that Big Southern Butte will not be opened for commercial communication site operations. In the MFP, Big Southern Butte is rated "Visual Quality A" which means it has highest and outstanding visual qualities, the management objective of this class being to retain the existing character of the landscape.

The Big Desert MFP also states that a superior communications site already exists at Jumpoff Peak and has several advantages over Big Southern Butte. Jumpoff Peak is 1,378' higher, has commercial power, vacant lots, and additional space available in existing buildings along with safer winter access. Power density studies have shown that Jumpoff Peak provides comparable radio coverage for southeastern Idaho. The road to Big Southern Butte is closed during the winter to prevent damage from off-road vehicle use.

(Decision at 1.) The Area Manager also noted that not only had the District Advisory Council recommended that BLM not allow commercial development of Southern Butte, but that Big Southern Butte was registered as a National Natural Landmark under the National Historic Sites Act of 1935, 49 Stat. 666, as amended, 16 U.S.C. §§ 461-467 (1994). Id. at 1-2.

On appeal, Teton asserts that the Area Manager's determination is arbitrary and capricious. Responding to the Area Manager's reference to the "Visual Quality A" rating, Teton argues that "[t]he development we have proposed would offer almost no impact to the visuals offered" and that "this is a developed site with a developed road," alluding to a two-story BLM Fire Lookout Building, a large tin shack and propane tanks which, Teton asserts, can be seen from 50 miles away. (Statement of Reasons at 2.) Appellant also notes that Big Southern Butte is currently used for grazing and recreation, in addition to communications, "making it a true 'multiple use' site." Id. Teton assails the Area Manager's reliance on the current Land Use Planning Decision because the plan is based on information which is over 13 years old and is scheduled to be reviewed soon. In addition, Teton asserts that, contrary to the Area Manager's opinion, other existing sites are inadequate for the type of coverage it would service, i.e., "low-power handheld or personal point to point communications devices." Id. Appellant concludes that rejecting this application is tantamount to "denying the people who live, work and play in the Big Lost River Valley wireless communication services that save lives and money." Id. at 3.

[1] The Secretary of the Interior is authorized under section 501(a)(5) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(5) (1994), to grant rights-of-way over public lands for "systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication."

Approval of rights-of-way, however, is a matter committed to the Department's discretion. Dale Ludington, 94 IBLA 167, 172 (1986); Lower Valley Power & Light, Inc., 82 IBLA 216 (1984). Thus, a BLM decision approving or rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. Coy Brown, 115 IBLA 347, 356 (1990); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988).

In its review of the application, BLM noted that, under the existing Big Desert MFP, Big Southern Butte is managed to limit commercial development so as to avoid environmental impacts which may devalue the aesthetic values presently found at the site. Additionally, BLM concluded that the proposed right-of-way site would constitute an unnecessary expansion to the local network of existing communications sites on public lands and therefore would result in needless environmental impacts to an environmentally sensitive area.

In section 503 of FLPMA, 43 U.S.C. § 1763 (1994), Congress specifically provided that "[i]n order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical * * *." Under 43 C.F.R. Subpart 2802, an application for a right-of-way may be denied if

the authorized officer determines that the proposed right-of-way would be inconsistent with the purpose for which these public lands are managed or the right-of-way would otherwise not be in the public interest. 43 C.F.R. § 2802.4(a)(1), (2). Avoiding the unnecessary proliferation of rights-of-way and associated structures on public land, especially where to do so minimizes environmental damage, is undoubtedly in the public interest. See Ben J. Trexel, 113 IBLA 250, 253 (1990); Glenwood Mobile Radio Co., *supra*, at 42.

Teton asserts that BLM has not properly assessed its needs and that it has overstated the ability of Jumpoff Peak and other private facilities to provide the coverage for low-power handheld and point-to-point communication devices. However, we find that BLM adequately considered the relevant factors in deciding to reject the application and its decision reflects a proper exercise of its discretionary authority.

As the party seeking to effectively amend an established MFP and to permit uses therein proscribed, Teton had the burden of establishing that a sufficient basis existed which might justify an amendment of the MFP. While Teton asserted that the type of coverage which it wished to provide was not presently available, it failed to augment its application or arguments with any evidence, especially in the form of empirical data, which would establish that the Jumpoff Peak and other sites are indeed inadequate. Moreover, it provided no argument which addressed the widespread opposition to the location of any further development on Big Southern Butte expressed by local residents during the formulation of the MFP. This factor, as well as the possible impacts on visual and aesthetic values associated with allowance of the application, could be sufficient to justify rejection of the application, regardless of whether or not the type of coverage which Teton sought to supply was readily obtainable from other sources.

We have noted many times that a party challenging a decision rendered by BLM in the exercise of its delegated authority has the burden of establishing error by the preponderance of the evidence. See Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984); James Spur, Inc. v. Office of Surface Mining Reclamation and Enforcement (OSM), 133 IBLA 123, 178 (1995); Powderhorn Coal Co. v. OSM (On Reconsideration), 132 IBLA 36, 40 n.2 (1995). The Bureau has provided more than adequate justification for its rejection of the instant application. 1/

1/ We note that, as BLM noted, the Big Southern Butte MFP is scheduled for updating in the near future. Appellant may not only participate in this process, it may attempt to have the MFP changed so that communications use on Big Southern Butte is recognized as a permissible use under the management guidelines ultimately adopted. Certainly, such a change might make it far more likely that a future application for such use would receive favorable consideration by BLM.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

T. Britt Price
Administrative Judge